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March 20, 2019

VIA E-FILING

Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: Massachusetts Nurses Association
and St. Luke's Hospital
Case No. 01-RC-230363

Dear Sir or Madam:

Enclosed for filing please find the Massachusetts Nurses Association's "Amended Opposition To Employer's Request For Review Of Hearing Officer's Decision." Please disregard the prior version of the Opposition filed earlier today.

Thank you for your assistance.

Very truly yours,



Kristen A. Barnes

KAB/sh
Enclosure

cc: Anthony D. Rizzotti, Esq. (By PDF Email)
Gregory A. Brown, Esq. (By PDF Email)
Paul J. Murphy, Acting Regional Director (By PDF Email)

UNITED STATES OF AMERICA BEFORE
THE NATIONAL LABOR RELATIONS BOARD

In the matter of

St. Luke's Hospital,

Employer,

and

Massachusetts Nurses Association

Petitioner

Case No. 01-RC-230363

**MASSACHUSETTS NURSES ASSOCIATION'S "AMENDED" OPPOSITION TO
EMPLOYER'S REQUEST FOR REVIEW OF HEARING OFFICER'S DECISION**

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	i
I. Introduction	1
II. Factual Background	2
III. Argument	13
1. The Employer Has Not Identified Any Grounds Related To Its Allegations Of Voter Fraud Warranting Review By The Board.	13
A. The Regional Director And Hearing Officer's Factual Findings Regarding The Employer's Claim Of Voter Fraud Were Accurate And Should Not Be Disturbed.	14
B. The Hearing Officer and Regional Director Applied The Appropriate Legal Standards In Assessing The Employer's Voter Fraud Allegation.	19
2. No Grounds Exist to Overturn The Regional Director's Findings Related To The Vote Yes Petition.	26
A. The Regional Director Appropriately Concluded That The "Vote Yes" Petition Was Not Objectionable Under Midland.	26
B. The Regional Director Appropriately Concluded That The "Vote Yes" Petition Was Not Objectionable Under Van Dorn.	32
C. The "Vote Yes" Petition Did Not Improperly Publicize RNS' Intended Votes.	45
IV. Conclusion	48
Certificate of Service	49

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Affiliated Computer Services, Inc.</u> , 355 N.L.R.B. 899 (2010)	20; 22
<u>Albertson’s, Inc.</u> , 344 N.L.R.B. 1357 (2005)	27; 28; 31
<u>Athbro Precision Engineering Corp.</u> , 166 N.L.R.B. 966 (1967)	22; 23
<u>Avondale Industries, Inc.</u> , 180 F.3d 633 (5 th Cir. 1999)	24
<u>Baja’s Palace</u> , 268 N.L.R.B. 868 (1984)	24; 25
<u>BFI Waste Services</u> , 343 N.L.R.B. 254 (2004)	43; 46
<u>Champaign Residential Services</u> , 325 N.L.R.B. 687 (1998)	27; 28; 46
<u>Durham School Servs., LP v. N.L.R.B.</u> , 821 F.3d 52 (D.C. Cir. 2016)	42
<u>Durham School Servs., LP</u> , 360 N.L.R.B. 851 (2014)	40; 41; 43; 45
<u>Enterprise Leasing Company</u> , 357 N.L.R.B. 1799 (2011)	42; 43; 46
<u>Farrell-Cheek Steel Co.</u> , 115 N.L.R.B. 926 (1956)	21
<u>Galbreath & Company</u> , 288 N.L.R.B. 876 (1988)	26
<u>Gormac Custom Manufacturing</u> , 335 N.L.R.B. 1192 (2001)	38
<u>J.C. Brock Corp.</u> , 318 N.L.R.B. 403 (1995)	20
<u>Midland National Life Insurance Co.</u> , 263 N.L.R.B. 127 (1982)	26; 27; 28; 29; 30; 31; 32; 33; 39; 41; 42; 43; 45; 46

<u>Monfort, Inc.</u> , 318 N.L.R.B. 209 (1995)	21
<u>Mt. Carmel Medical Center</u> , 306 N.L.R.B. 1060 (1992)	28; 29; 31
<u>N.L.R.B. v. Black Bull Carting</u> , 29 F.3d 44 (2d Cir. 1994)	20
<u>N.L.R.B. v. Gormac Custom Mfg., Inc.</u> , 190 F.3d 742 (6th Cir. 1999)	32; 33
<u>Parkview Community Hospital Medical Center v. N.L.R.B.</u> , 664 Fed. Appx. 1 (D.C. Cir. 2016)	42
<u>Parkview Community Hospital Medical Center</u> , 2015 WL 413882, 21-RC-121299 (2015)	21; 22
<u>Picoma Industries</u> , 296 N.L.R.B. 498 (1989)	31; 32
<u>Polymers, Inc. v. NLRB</u> , 414 F.2d 999 (2d Cir. 1969)	23
<u>Pulau Corp.</u> , 363 N.L.R.B. No. 8 (2015)	19
<u>Sawyer Lumber Co.</u> , 326 N.L.R.B. 1331 (1998)	23
<u>Somerset Valley Rehabilitation & Nursing Center</u> , 357 N.L.R.B. 736 (2011)	39; 40; 46
<u>St. Vincent Hospital</u> , 344 N.L.R.B. 586 (2005)	20
<u>UNISERV</u> , 340 N.L.R.B. 199 (2003)	33
<u>Virginia Concrete Corp.</u> , 338 N.L.R.B. 1182 (2003)	26

Regulations

29 C.F.R. § 102.67(e).	14; 19; 46
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I. INTRODUCTION

On November 2, 2018, Massachusetts Nurses Association (“MNA” or “Union”) filed a petition seeking to represent a bargaining unit of registered nurses (“RNs”) employed by St. Luke’s Hospital (“Hospital” or “Employer”). On November 29, 2018, a secret ballot election was held at the Hospital, pursuant to the parties’ stipulated election agreement, during which 350 ballots were cast for representation by MNA and 283 ballots were cast against representation in addition to 26 challenged ballots.¹ Thereafter, on December 6, 2018, the Employer filed objections to the election alleging (1) that the election should be overturned due to alleged voter fraud and (2) that MNA distributed a document containing alleged forgeries and misrepresentations. A hearing was held on January 11, 2019 before Hearing Officer Colleen M. Fleming, Esq. On January 31, 2019, the Hearing Officer issued her report recommending that the Employer’s objections be overruled in their entirety.

On February 14, 2019, the Employer filed thirty-seven exceptions to the Hearing Officer’s report. On February 27, 2019, Regional Director Paul J. Murphy overruled the Employer’s exceptions in their entirety and issued a certification of representative. On March 13, 2019, the Employer filed a request for review with the National Labor Relations Board (“Board”) largely reiterating the claims rejected by the Regional Director. In its request for review, the Employer continues to attempt to substitute mere supposition for

¹ As a part of a stipulated election agreement executed by MNA and the Hospital, the parties agreed to permit a group of multi-site float RNs to vote subject to challenge.

actual evidence to support its objections. As will be described in detail below, the Regional Director, relying on the appropriate legal precedent, correctly concluded that the Employer's objections should be overruled in their entirety.

II. FACTUAL BACKGROUND

On September 13, 2018, MNA began collecting signed authorization cards from RNs at the Hospital. The top half of the authorizations cards utilized by MNA (Petitioner Exhibit 1) contained the following text,

St. Luke's Nurses United

We are nurses united in our goal to build a union and gain an organized voice to make improvements at St. Luke's Hospital. We have come together to help build a better hospital for our patients, our coworkers, and our community. As professionals who provide day-to-day care, on every shift and in every department, we are tired of the disregard for our concerns in OUR hospital. If St. Luke's is going to be "more than medicine," nurses need real decision-making power that cannot simply be overruled by administrators who have moved away from the bedside.

United by our resolve to improve staffing, safety, equipment, wages, benefits, and working conditions, we are coming together to build this new organization under one principle: that WE are the union, and that conditions can be better once WE, the nurses of St. Luke's Hospital, have an equal authority in how our hospital is run. We invite all of our coworkers to join us in standing up and finding our voice!

Below that statement, the cards included the names and Hospital units of 43 RNs supporting the organizing campaign. Below a perforation, the bottom half of the card contained the following red text,

I choose to join with my co-workers in forming a union within the Massachusetts Nurses Association for the purpose of negotiating improvements in staffing, wages, benefits, and working conditions.

Under the statement, the card included spaces for an RN to provide his or her name, mailing address, email address, and phone numbers. Below the lines for demographic information and above a blue signature box, the authorization card contained an explicit statement authorizing the addition of the RN's signature to a public petition:

*I understand my signature will be added to a public petition
once a majority of nurses have signed.*

(Petitioner Exhibit 1). Underneath the blue signature box, the card included a section where the signer could check off his or her reasons for joining the union:

I am joining our union for:

☐ Respect ☐ A say in my workplace ☐ Job Security
☐ Fairness ☐ Improved pay & benefits ☐ Improved Patient Care
☐ Other: _____

(Petitioner Exhibit 1).

All RNs signed the same version of the authorization card. (Hermanson, 89). MNA kept signed authorization cards in a secure box. (Hermanson, 115).²

Hermanson himself met with RNs from the Hospital and collected cards from more than 20 RNs. (Hermanson, 65, 115). When obtaining cards, Hermanson explained to RNs that signing the card meant that they wanted to form a union, that they would vote yes in an election, and that MNA would use

² Citations to the transcript shall be made by witnesses' last name and page number throughout. Ole Kushner Hermanson, a Director of Strategic Campaigns for MNA since July 2017, worked on the organizing campaign at the Hospital while acting as MNA's Organizing Director. (Hermanson, 62-63).

their signatures on a public petition that would be distributed throughout the Hospital that would be seen by managers. (Hermanson, 75-76, 110-11, 114-15).

In addition to Hermanson, Jon Neale, an employee of MNA, and three or four organizers from the Northeast Nurses Association (“NENA”) worked on the campaign. (Hermanson, 64-66). Hermanson, Neale, the NENA organizers and approximately 50 RNs from the Hospital actively involved in the organizing effort collected authorization cards on behalf of MNA. (Hermanson, 65-66, 123). Hermanson personally trained the individuals collecting cards for MNA and instructed them to make it very clear that the person was signing the card in order to form a union, that signing a card indicated that the person would vote yes if there was an election, and that the person’s signature would be included on a larger petition published throughout the Hospital that would be seen by management. (Hermanson, 88-89, 110).

Prior to the November 29 election, MNA created Employer Exhibit 1, which it referred to as a petition, a “Vote Yes” Petition, or a public sign-on. (Hermanson, 121: 3-4). On the front of the petition, the MNA service mark and text stating “ST. LUKE’S NURSES SAY: WE’RE VOTING YES ✓” appeared above many photographs of RNs, including multiple photographs of RNs holding signs reading “union yes.” The back of the petition contained approximately 400 RN signatures surrounding the following text,

St. Lukes Nurses United

We are nurses united in our goal to build a union and gain
an organized voice to make improvements at St. Luke’s

Hospital. We have come together to help build a better hospital for our patients, our coworkers, and our community. As professionals who provide day-to-day care, on every shift and in every department, we are tired of the disregard for our concerns in OUR hospital. If St. Luke's is going to be "more than medicine," nurses need real decision-making power that cannot simply be overruled by administrators who have moved away from the bedside.

United by our resolve to improve staffing, safety, equipment, wages, benefits, and working conditions, we are coming together to build this new organization under one principle: that WE are the union, and that conditions can be better once WE, the nurses of St. Luke's Hospital, have an equal authority in how our hospital is run. We invite all of our coworkers to join us in standing up and finding our voice.

We are Voting Union YES!

The text on the back of the petition was nearly identical to that included on the top half of MNA's authorization cards. (Compare Petitioner Exhibit 1 with Employer Exhibit 1). The petition was clearly labeled as originating from MNA including both MNA's mailing address and MNA's service mark. (See Employer Exhibit 1).

The "Vote Yes" petition was created digitally utilizing RNs' signatures scanned from the authorization cards. (Hermanson, 70). RNs also took photographs for the "Vote Yes" petition indicating their support for the union. (Hermanson, 119).

During the campaign, MNA, through organizers and RNs, checked in with RNs to make sure that their support for the union was still strong. (Hermanson, 118-119). During the creation of the "Vote Yes" petition, MNA removed the signatures of about 10 to 12 RNs, including Tony Diaz, Sonia Leiato, Chris Ketchel, Leonette Mondesir, and Tom Waithe, because

Hermanson had heard that their support of MNA had waivered. (Hermanson, 89-102). Hermanson recalled that Diaz had attended a meeting with other RNs and asked questions after reading materials created by management. At the conclusion of the meeting, Diaz indicated that he was not sure about forming a union or voting yes. (Hermanson, 106-07). Other organizers and RNs reported to Hermanson that they had interactions with the remaining RNs whose signatures were removed from the “Vote Yes” petition indicating that they were feeling uncomfortable about being public with their support, that they were feeling pressured by management, or that they had changed their minds about supporting a union. (Hermanson, 107).

Prior to distribution, MNA showed the “Vote Yes” petition to the RNs most actively involved in the organizing campaign to make sure that it was as discussed. (Hermanson, 119). Hermanson believed that every RN on the “Vote Yes” petition was voting for the union at the time the petition was created and distributed. (Hermanson, 80).³ At hearing, Hermanson explained that MNA circulated the petition because it wanted RNs who signed cards to know that they were supported by many of their coworkers who had also signed cards. (Hermanson, 82).

³ There is no evidence showing that MNA knew that any RN included on Employer Exhibit 1 no longer supported MNA or no longer wished to vote for the Union.

On Saturday, November 24, 2018,⁴ MNA mailed about 450 copies of the “Vote Yes” petition to RNs who had signed authorization cards during the organizing campaign and to certain other RNs that Hermanson thought might want to see it. (Hermanson, 68-69, 111). Hermanson explained that MNA did not mail the “Vote Yes” petition to RNs that it had no contact with during the organizing campaign or to RNs who indicated that they were opposed to unionization. (Hermanson, 112). Another 450 copies of the “Vote Yes” petition were passed out by RNs supporting MNA or were given to RNs when visited at their homes. (Hermanson, 68-69). MNA asked RNs to post the “Vote Yes” petition on bulletin boards in the Hospital where they had been putting up other union materials. (Hermanson, 121). Hermanson heard that the “Vote Yes” petition was posted on the bulletin boards in the Emergency Department and in the Family Center Unit. (Hermanson, 122).⁵

At hearing, Kelly Perry, an RN in the Emergency Department at the Hospital, testified that she signed a union authorization card while at work. According to Perry, Deb Falk, another RN, gave her the card and told her that they were signing cards to get enough votes to vote in a union. (Perry, 13-14). Falk tore off the bottom of the card where Perry signed and gave Perry the top

⁴ MNA wanted to distribute the “Vote Yes” petition earlier but was unable to do so due to the Thanksgiving holiday. (Hermanson, 81).

⁵ In addition to the “Vote Yes” petition, MNA created a “mission statement” using about 30 scanned signatures from the authorization cards of the key RNs involved in the organizing effort. (Hermanson, 71, 113). MNA attempted to deliver the mission statement to Keith Hovan, CEO of Southcoast Health, on the day that MNA filed its representation petition. (Hermanson, 71, 112). MNA sought permission from each RN to use the signatures on the mission statement. (Hermanson, 72, 113).

half of the card to keep. (Perry, 25). Perry checked off “Fairness” and “A say in my workplace” as her reasons for joining the union on her authorization card. (Petitioner Exhibit 2).

Perry testified that she believed that her card would be kept confidential, however, she could not recall Falk ever telling her that the card would be kept confidential. (Perry, 16). Perry further indicated that Falk did not tell her that the authorization card would give MNA the right to use her picture or signature without her consent. (Perry, 16). At hearing, however, Perry admitted that she knew her signature would not be kept confidential. Perry acknowledged that she read the statement “I understand my signature will be added to a public petition once a majority of nurses have signed” on the authorization card prior to signing the card and knew that her name could be added to a public petition. (Perry, 31; see Petitioner Exhibit 2).⁶

In the summer of 2018 or September 2018, Perry met with Falk and Neale, to discuss the union. (Perry, 18). Perry indicated that she was going to vote yes for the union during that meeting. (Perry, 18, 27). Perry also indicated that she was going to vote yes to Falk at the time she signed her authorization card. (Perry, 27). At hearing, Perry acknowledged that she believed that she signed the authorization card because she was going to vote yes for the union. (Perry, 34).

⁶ At hearing, Perry contended that she believed a public petition was “to petition the work environment that we were going to go ahead and be able to vote for a union.” (Perry, 34). Perry never asked MNA what “public petition” meant on the authorization card. (Perry, 35).

On November 26, 2018, Perry saw the “Vote Yes” petition posted on the bulletin board in the Emergency Department lounge. (Perry, 18). Perry testified that by the time the petition was posted, she had privately changed her mind about voting for the union. (Perry, 19). Perry, at no point, notified MNA that she had changed her mind about voting yes. (Perry, 32).

Also on November 26, an Intensive Care Unit (“ICU”) RN, Alysa Lopes, showed Beth Sweet, an RN in the ICU and the Employer’s election observer, the “Vote Yes” petition. Sweet did not see the petition anywhere else in the Hospital. (Sweet, 42-43). Thereafter, Sweet saw a Facebook post by Lopes regarding the “Vote Yes” petition. (See Employer Exhibit 2).⁷ Sweet testified that during the day shift in the ICU, RNs Heather Ferreira, Hailey Arruda, and Deborah Tarr-Johnson also told her that they did not know that their names would be on the petition and that they thought the authorization cards were to get information. (Sweet, 44-45). Sweet testified that other RNs were also present, but she could not recall how many. (Sweet, 45, 48).

Carol Holland, Vice President of Human Resources for Southcoast Health, testified that she learned that MNA had distributed the “Vote Yes” petition when she received calls from five managers saying that their employees were upset. (Holland, 132).

Pursuant to the parties’ stipulated election agreement, the election was held on November 29, 2018 over three voting sessions from 6:00 a.m. to 9:00 a.m.; 2:00 p.m. to 4:30 p.m.; and from 6:30 p.m. to 9:00 p.m. Sweet served as

⁷ The Facebook post was accepted for the sole purpose of showing dissemination of information but not for its truth. (Transcript, 47).

the Employer's observer at all three voting sessions. (Sweet, 37-38). On the morning of the election, the parties agreed to certain changes to the voter list that initially included 731 RNs. (Petitioner Exhibit 3).⁸ Rhonda Amaral, Sarah Crowley, Scott Dobihal, Karla Holmes, Rachel Moyo Barrett, Rebecca Maraves, Mary Olson-Carter, Ashlee Pires, and Kelly Shumway were removed from the list. (Transcript, 137). Sandra Arujo and Katie Desjarlais were added to the list. (Transcript, 137). Thus, following the changes, the list contained the names of 724 eligible voters inclusive of the multi-site float RNs who were being permitted to vote subject to challenge pursuant to the parties' stipulated election agreement. (Petitioner Exhibit 3; Transcript, 137).

The election was held in the living room of the Hospital's White Home building. (Sweet, 38). During the morning and afternoon sessions, only one RN was permitted in the room at a time to vote. (Sweet, 38). During the evening session, the Board agents did not limit the number of RNs allowed into the room and 4 or 5 RNs were present at a time. (Sweet, 38).

During the morning and afternoon sessions, Sweet was seated at a table on the left with the MNA observer seated to the right. A Board agent stood behind the observers at the morning and afternoon sessions. When an RN came to vote, Sweet asked the RN to state his or her name. Sweet indicated that RNs were told that they were not required to present their IDs. She would check the RN's name off on one side of the voter list and the MNA observer would check off the name on the other side of the list. After the RN's name was

⁸ The names of the 32 multi-site float RNs who were voting subject to challenge were included in the 731 RN total.

checked, he or she went to the next table and was given a ballot by a Board agent. (Sweet, 39).

During the second session, RN Courtney Beaulieu appeared to vote. Sweet flipped through the voter list and located Beaulieu's name which had been checked off. (Sweet, 40). Sweet said to Beaulieu, it appears you voted this morning. (Sweet, 40). Beaulieu was upset and said, no, I did not vote this morning, I'm just getting here now. (Sweet, 40). Beaulieu presented an ID when asked. (Sweet, 41). According to Sweet, when Courtney Beaulieu appeared to vote, both Beaulieu's name and another RN with the last name Beaulieu had already been checked off. (Sweet, 131). The NLRB agent told Beaulieu she could vote but that her vote would be subject to challenge. (Sweet, 40). Beaulieu voted and her ballot was put into an envelope. (Sweet, 41). Prior to the election, Sweet was not familiar with Beaulieu. (Sweet, 41). In contrast to her testimony that only one voter was permitted in the room at a time during the afternoon session, at hearing, Sweet testified that there were other voters in the room when Beaulieu cast her ballot but she could not recall how many voters were present. (Sweet, 41). Sweet testified that the Board agent was concerned. (Sweet, 41). Thereafter, the Board agent said the issue could affect the election and "it might have to be a re-vote." (Sweet, 41-42).

Frazer testified that Beaulieu spoke with her around 2:00 p.m. on the day of the election. (Frazer, 52, 54). Beaulieu told Frazer that someone had voted under her name and Frazer took a signed statement from her. (Frazer, 56; Employer Exhibit 3).

Hermanson; Sweet; Holland; Gregory Brown; counsel for the Hospital; Brenda Lucile, MNA's observer; and a number of Board agents were present after the second voting session. Hilary Bede indicated that a person came in, that she had been allowed to vote subject to challenge, and that if the election was decided by a single vote they might have to have a new election. (Hermanson, 86). Hermanson was aware of the issue prior to the meeting. Beaulieu had called an RN who was involved in the organizing campaign to report what had happened. (Hermanson, 85-86).

Holland testified that Bede came up to her and Brown and said that there was an issue during the last session. According to Holland, Bede stated that an employee's name had already been checked off and it could overturn the results of the election. Holland asked if Bede had ever had it happen before. Holland testified that Bede replied, I have never had this happen before, I do not know how it happened. (Holland, 135). Holland could not recall if Hermanson was standing with her when she spoke with Bede. (Holland, 135-36).

Perry testified that she briefly heard Beaulieu speaking to two or three other RNs. According to Perry, Beaulieu told those RNs that she was told that she had already voted and that she thought that was crazy. (Perry, 22-24). Perry herself voted during the election and, to the best of her knowledge, the two to three RNs she overheard Beaulieu speaking to in the Emergency

Department also voted. (Perry, 32). Perry was unaware of any RN who did not vote because of Beaulieu's situation. (Perry, 32).⁹

Sweet voted in the election on November 29, 2018. (Sweet, 48). Sweet testified that five or six ICU RNs did not vote in the election while approximately 50 ICU RNs voted. (Sweet, 49).

III. ARGUMENT

The Regional Director correctly found, based on the record evidence and the applicable legal precedent, that the Employer failed to allege objectionable conduct sufficient to set aside the election. In its request for review, the Employer has failed to identify any persuasive reason that the Board should overturn the Regional Director's findings and has not shown (1) that the Regional Director's decision departed from officially reported Board precedent; (2) that the Regional Director's decision contained clearly erroneous rulings on substantial factual issues; or (3) that, under these circumstances, there are compelling reasons for reconsideration of important Board precedent. The Employer's request for review should, thus, be denied in its entirety.

1. The Employer Has Not Identified Any Grounds Related To Its Allegations Of Voter Fraud Warranting Review By The Board.

In its request for review, the Employer has contended that the Board should set aside the Regional Director's factual and legal findings related to its

⁹ There is no evidence that any RNs other than Perry and the two to three RNs that Perry overheard Beaulieu speaking knew about the issue with Beaulieu's vote during the election. Further, there is absolutely no evidence to suggest that any RNs failed to vote because of the Beaulieu issue.

contention that voter fraud allegedly occurred during the election. The Board should reject the Employer's request where the Hearing Officer and Regional Director utilized the appropriate legal standards in assessing the Employer's claims. The Regional Director correctly concluded that the Employer failed to adduce any evidence of fraudulent, or even arguably inappropriate conduct, impacting the election.

A. *The Regional Director And Hearing Officer's Factual Findings Regarding The Employer's Claim Of Voter Fraud Were Accurate And Should Not Be Disturbed.*

Foremost, to the extent that the Employer seeks to overturn the Hearing Officer and Regional Director's factual findings related to its alleged voter fraud allegation, its request for review is inadequate for such a purpose. Although it contends that several factual findings of the Hearing Officer and Regional Director were inappropriate, it has failed to concisely collect the factual evidence it contends support alternative findings in its request for review. See 29 C.F.R. § 102.67(e). The Employer's challenge related to the Regional Director's factual findings should be rejected on that basis alone.

Contrary to the Employer's contention, the undisputed facts do not show that any individual voted in place of Ms. Beaulieu.¹⁰ The Hearing Officer and Regional Director correctly found that the Employer adduced no evidence of

¹⁰ It is clear that the Employer is attempting to rely on mere supposition drawn from the fact that Ms. Beaulieu's name was checked off on the voter list when she appeared to vote during the second session to establish the existence of voter fraud. The Employer does not point to any record evidence establishing how Ms. Beaulieu's name was checked off or showing fraud.

actual voter fraud. (Regional Director's Decision, at 3). Other than mere speculation, the Employer does not point to any record evidence supporting its claim that some person fraudulently used Ms. Beaulieu's name to cast a ballot. The record contains no evidence as to how, or when, Beaulieu's name was checked off by the observers. The Employer's observer, Sweet, was present for all three voting sessions and testified at hearing. She did not indicate that any voter appeared prior to Courtney Beaulieu who gave Beaulieu's name.

Although it is undisputed that Courtney Beaulieu's name was checked off prior to when she appeared to vote during the second voting session, the Employer has failed to show that another voter used Beaulieu's identity or that any sort of impropriety resulted in the checking off of Beaulieu's name.¹¹ The November 29, 2018 election was conducted pursuant to the Board's accepted practices and under the supervision of multiple Board agents. Each party was permitted to have an observer present during the three voting sessions and the parties' observers were mutually responsible for checking off the voter list as RNs appeared to vote. Thus, the record fully supports the Regional Director

¹¹ There is no evidence that anyone besides Courtney Beaulieu appeared and gave her name. Further, it is easy to imagine a scenario in which a name is misheard by both observers or where the second observer simply followed the mistaken lead of the first observer in making a check. The voter list (Petitioner Exhibit 3) indisputably contains similar names to Courtney Beaulieu. Indeed, the list included four other RNs with the first name Courtney: Courtney Cogliano, Courtney Grippin, Courtney Hayes, and Courtney Pelletier. In the absence of any evidence establishing that fraud occurred, the checking off of Beaulieu's name was likely a mere clerical error. Sweet testified that another RN who had the same last name as Beaulieu, Kimberly Beaulieu, was already checked off at the time Courtney Beaulieu reported to vote. The Board can verify the accuracy of that testimony (at least to the extent that it can identify whether Kimberly Beaulieu's name was ever checked off, before or after, Beaulieu's vote) with the actual voter list.

and Hearing Officer's conclusions that the Employer failed to show the existence of fraud, or any other sort of impropriety, in the conduct of the election. While the Employer contends that such findings were erroneous, it has not pointed to any record evidence that could support a contrary conclusion.

Similarly, the Hearing Officer and Regional Director appropriately concluded that the Employer failed to adduce evidence that knowledge of the Beaulieu incident was widely disseminated among the over 700 voters or that it was prejudiced by that single procedural irregularity. (Regional Director's Decision, at 3-4). While the Employer has contended that the event created the impression that the election was a sham among RN voters, it has offered no evidence whatsoever establishing that any RN refrained from voting, or otherwise believed that the election was a farce either during or after the election, because of the Beaulieu incident.

Contrary to the Employer's claim that the news spread quickly throughout the Hospital, the record does not show that the Beaulieu incident was widely disseminated either during or after the election.¹² The Hearing Officer accurately found that, at most, only 10 RNs learned of the incident. (Hearing Officer's Report, 6). The evidence shows that Perry overheard Beaulieu discussing the incident with 2 to 3 RNs on her floor and that Beaulieu called

¹² Notably, the Employer declines to tie its claim of widespread dissemination and prejudice to any actual record evidence. Perhaps the Employer thinks that its allegations that the knowledge of the issue concerning Beaulieu's vote was widespread and prejudiced the Employer will be accepted, in the absence of any supporting evidence, if it merely repeats those claims over and over again.

another RN, involved in MNA's organizing effort, to report what had happened. The Hearing Officer found that, at most, 4 or 5 other RNs might have been present in the polling place when the incident occurred.¹³ Although the Employer contends that the incident was widely disseminated, no record evidence exists to show that more than 10 RNs learned about the incident during the election. Indeed, the Employer points to no evidence to support an alternative conclusion in its request for review.

Moreover, no evidence whatsoever exists to show that the incident had any impact upon the votes of the RNs who learned about it during the election. 4 or 5 of the, at most, 10 RNs learned about the incident while voting and, thus, cast ballots. Perry confirmed that she and the 2 to 3 other Emergency Department RNs who learned about the incident from Beaulieu voted. (Perry, 32).¹⁴ No evidence was adduced as to whether or not the RN who Beaulieu called did or did not vote in the election.¹⁵

¹³ In so concluding, the Hearing Officer apparently relied on conflicting testimony given by Sweet. Sweet first testified that during the election's second voting session only one RN was allowed into the voting room at a time. (Sweet, 38). Thereafter, Sweet testified that there were other voters in the room with voter Courtney Beaulieu, who appeared to vote during the second voting session, but she could not recall how many voters were present. (Sweet, 41). Thus, an estimate that even 10 RNs learned about the event is likely inflated.

¹⁴ There is no evidence that any other RNs in the Emergency Department heard about the event or failed to vote because of it. Further, Perry testified that the Emergency Department is actually separated into teams of RNs making widespread dissemination even more unlikely.

¹⁵ That RN was actively involved in the MNA organizing effort and, thus, no evidence exists to even infer that the RN's vote, whether or not it was cast, would have been in favor of the Hospital.

Indeed, even if, *arguendo*, information about the incident was more widely transmitted during the actual election, the Employer has not pointed to any evidence of any nature showing that the incident had any impact on the election or that any voters considered the process to be a sham as a result. Out of approximately 724 eligible voters, only 65 RNs failed to cast a ballot during the election.¹⁶ Neither Beaulieu's challenged ballot, nor any ballot that speculatively might have been cast when her name was checked off, had any impact on the results of the election.

While the Employer insinuates that the 65 RNs who did not participate in the election failed to vote because of the Beaulieu incident, no record evidence supports that contention. No evidence exists identifying the 65 RNs. Even if the 65 RNs were identified on the record, no evidence exists to show that they both knew about the Beaulieu incident and did not vote because of it. Thus, the Employer adduced absolutely no evidence showing that the Beaulieu incident had any impact upon the election, that any RNs did not vote because of it, or that any RNs who did not vote even knew about the incident. The Employer has, thus, offered no basis whatsoever to support its contention that the Hearing Officer and Regional Director's factual findings should be overturned regarding alleged dissemination or prejudice to the election.

¹⁶ The initial voter list (Petitioner Exhibit 3) contained the names of 731 eligible voters. It should be noted that the names of the multi-site float RNs who were voting subject to challenge were included in the 731 RN total. On the morning of the election, the parties agreed to add 2 RNs and remove 9 RNs from the list.

Further, in its request for review, the Employer argues that the procedures used by the Region were ineffective.¹⁷ The Employer never contended that the identification procedures utilized by the Region to supervise the election were somehow insufficient as a part of its objections. To the extent the Employer is attempting to pursue such a claim in its request for review, such a claim should be rejected as waived. See 29 C.F.R. § 102.67(e); Pulau Corp., 363 N.L.R.B. No. 8, n.1 (2015).¹⁸

B. The Hearing Officer and Regional Director Applied The Appropriate Legal Standards In Assessing The Employer's Voter Fraud Allegation.

In its request for review, the Employer contends that the Regional Director ignored decades of longstanding Board precedent holding that an election should be set aside where there is the potential for voter fraud. Nevertheless, the Employer has failed to cite even a single case where the Board overturned an election under factually analogous circumstances.

¹⁷ The Board maintains no requirement that observers check voters' IDs. In this case, the election was not especially large and covered a single facility. There is no evidence to suggest that the Employer ever raised the possibility of requiring voters to present IDs prior to, during, or following the election or expressed concern that its observer would not be capable of identifying the RN voters. The Employer did not file any objection contending that the Board had adopted insufficient identification procedures for the November 29 election.

¹⁸ To the extent that the Employer is urging the Board to adopt a new standard providing that any procedural irregularity will overturn an election, in the absence of any untoward conduct or prejudice to any party, such a standard would plunge the conduct and review of elections into chaos. It is possible to imagine circumstances in which voters supporting either party could force a re-run of any election due to a so-called irregularity.

Instead, the Employer points to inapplicable cases, generally, involving alleged misconduct by Board agents or large-scale procedural issues.

In reaching the conclusion that the Employer's objection related to Beaulieu's vote was insufficient to overturn the election, the Regional Director and Hearing Officer applied the appropriate legal standards. Consistent with the findings of the Hearing Officer and Regional Director, "[a] party seeking to overturn an election on the ground of a procedural irregularity has a heavy burden." N.L.R.B. v. Black Bull Carting, 29 F.3d 44, 46 (2d Cir. 1994). "The presence of such an irregularity is not in itself sufficient to overturn an election." N.L.R.B. v. Black Bull Carting, 29 F.3d 44, 46 (2d Cir. 1994); St. Vincent Hospital, 344 N.L.R.B. 586 (2005) ("There is not a per se rule that representation elections must be set aside following any procedural irregularity.") (declining to overturn election where two people were in the voting booth at the same time in the absence of further evidence showing that ballot secrecy was compromised). "Nor is it sufficient for a party to show merely a possibility that the election was unfair." N.L.R.B. v. Black Bull Carting, 29 F.3d 44, 46 (2d Cir. 1994). "Rather, the challenger must come forward with evidence of actual prejudice resulting from the challenged circumstances." N.L.R.B. v. Black Bull Carting, 29 F.3d 44, 46 (2d Cir. 1994); J.C. Brock Corp., 318 N.L.R.B. 403, 404 (1995) ("[The Board] requires more than mere speculative harm to overturn an election."); Affiliated Computer Services, Inc., 355 N.L.R.B. 899, 900 (2010) ("It is well settled that representation elections are not lightly set aside. The burden is on the

objecting party to show by specific evidence that there has been prejudice to the election.”).

Similarly, the Hearing Officer and Regional Director appropriately applied existing Board precedent noting that an allegation of voter fraud, in the absence of any evidence of actual fraudulent conduct, is insufficient to overturn an election. See Parkview Community Hospital Medical Center, 2015 WL 413882, 21-RC-121299 (2015) (adopting Hearing Officer’s recommendation on objections rejecting allegation that Board failed to properly supervise and control the voting list by permitting an employee to cast a ballot under another employee’s name creating the appearance of voter fraud with Member Johnson noting that the employer failed to meet its burden of proof citing to Farrell-Cheek Steel Co., 115 N.L.R.B. 926 (1956) for the proposition that, absent specific evidence of actual fraud, the opportunity for fraud is not a basis for overturning an election); Farrell-Cheek Steel Co., 115 N.L.R.B. 926 (1956) (rejecting employer’s claim that chain voting had occurred where employee had left voting area with a blank ballot because investigation had failed to uncover any evidence establishing that any voter had participated in a dishonest voting scheme making the employer’s allegation that chain voting had occurred merely speculative and without support); Monfort, Inc., 318 N.L.R.B. 209 (1995) (declining to overrule challenges to the votes of four voters whose names had been checked off on the Excelsior list on the basis of their testimony that they had not already voted and where the election had been conducted

pursuant to normal board practices of permitting the observers to check off names on the list).

Ignoring established precedent calling upon a party to show some actual evidence of impropriety and specific evidence of prejudice resulting from the challenged circumstances, see Affiliated Computer Services, Inc., 355 N.L.R.B. 899, 900 (2010), the Employer contends that the Board has refined its standard for assessing objectionable conduct cases involving either Board agent misconduct or Board agent action. See Parkview Community Hospital Medical Center, 2015 WL 413882, 21-RC-121299, n. 3 (2015) (“In cases involving allegations of Board agent misconduct, the question is whether the conduct at issue tends to destroy confidence in the Board’s election process or which could reasonably be interpreted as impugning the Board’s neutrality in the election. In other types of cases challenging the actions of a Board agent, the Board asks whether the conduct is sufficient to “raise a reasonable doubt as to the fairness and validity of the election.”) (internal citations omitted).

For instance, the Employer cites to Athbro Precision Engineering Corp., 166 N.L.R.B. 966 (1967) as standing for the proposition that the appropriate “test is whether the conduct at issue ‘tends to destroy confidence in the Board’s election process, or which reasonably could be interpreted as impugning the election standards [the Board] seek[s] to maintain.” However, Athbro arose in the context of an alleged impropriety on the part of the board agent supervising the election and the board commented upon its evaluation of conduct by its agents not mere procedural irregularities generally, stating,

The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election.

Athbro Precision Engineering Corp., 166 N.L.R.B. at 966 (setting aside election where an employee observed the board agent supervising the election having a beer with a union representative at an off-site café during the election between voting sessions).

In urging the Region to overturn the Hearing Officer's analysis, the Employer further cites to Sawyer Lumber Co., 326 N.L.R.B. 1331, 1331-32 (1998) which again pertained to Board agent conduct and, in actuality, supports the Region's rejection of the Employer's objection in the absence of any evidence of actual fraud or impropriety. In that case, the Board commented,

When the integrity of the election process is challenged, the Board must decide whether the facts raise a reasonable doubt as to the fairness and validity of the election. A *per se* rule [setting an election aside if there is a] possibility [of irregularity] would impose an overwhelming burden in a representation case. If speculation on conceivable irregularities were unfettered, few election results would be certified, since ideal standards cannot always be attained.

Sawyer Lumber Co., 326 N.L.R.B. 1331, 1331-32 (1998) (quoting Polymers, Inc. v. NLRB, 414 F.2d 999, 1004 (2d Cir. 1969)) (declining to overrule election based on employer's contention that there was an opportunity to tamper with the ballot box and blank ballots due to board agent taking a break where employer adduced no evidence of any actual tampering).

Likewise, Avondale Industries, Inc., 180 F.3d 633, 641 (5th Cir. 1999) is readily distinguishable from the case at hand. In Avondale, the Fifth Circuit set aside an election where it found that the NLRB failed to implement adequate identification procedures, including by failing to implement a functioning challenge procedure, in a large scale election involving 4000 employees, combined with evidence of extensive potential voter fraud. In that case, the voter list included only the employee's first initial and address. Voters verbally identified themselves and the agents checked only employee badges, which had tiny photographs and employees' first names, if they needed to verify a voter's identity. In addition to the use of an ineffectual identification procedure, 14 employees voted subject to challenge because they appeared after their names were checked off on the voter list; 126 employees who were allegedly absent from work voted in the election although gate logs at the highly secure facility did not reflect that they were present that day; there were 13 phantom ballots, meaning that 13 more votes were cast than employees marked as having voted; and there were 100 multiple vote voters. Here, the Employer did not allege that the Region adopted inadequate identification procedures in its objections to the election and the mere "potential" voter fraud alleged by the Employer nowhere approaches the scope of the irregularities at issue in Avondale.

For the first time in its request for review, the Employer argues that this case is factually similar to Baja's Place, 268 N.L.R.B. 868 (1984). Baja's Place, however, is utterly inapposite as compared to the circumstances surrounding

the Employer's allegation of alleged voter fraud. In Baja Place, the Board set aside an election based upon threats of economic reprisal, physical harm, and other unspecified reprisals made to an employee prior to an election.

As set out in detail above, the Employer has failed to adduce evidence of any kind establishing fraudulent conduct or impropriety or even an irregularity having any impact upon the conduct of the election. The Employer cannot rely upon mere supposition to overturn an election. Even if, *arguendo*, the Employer could demonstrate that some fraudulent or improper conduct occurred, absolutely no evidence exists showing that the circumstances surrounding Beaulieu's vote in any way impacted the election. As such, the Regional Director and Hearing Officer properly concluded that the Employer's objection concerning Beaulieu's vote should be overruled.¹⁹

¹⁹ Although the Employer continues to reference testimony related to the comments of Board agent Hilary Bede, it is not clear that the evidence related to Bede in any way forms a basis for the Employer's request for review. To the extent the Employer continues to argue that election should be overturned because Bede stated that it could be overturned, such a contention should be rejected. First, the evidence shows that Bede never said that the Beaulieu incident would result in a setting aside of the election. Rather, at most, Bede said that the issue could impact the election. While Bede was monitoring voting on the day of the election, she was not responsible for ruling on objections to the election or resolving challenges to ballots. The Employer's attorney was present for Bede's comments and was readily available to explain how election issues are resolved pursuant to the Board's processes to alleviate any confusion for the Employer. Further, even if, *arguendo*, Bede had made a comment of note, no evidence of any kind exists to suggest that her comment was disseminated to voters or had any impact on the conduct of the election.

2. No Grounds Exist to Overturn The Regional Director's Findings Related To The Vote Yes Petition.

The Regional Director appropriately concluded that MNA's "Vote Yes" petition was not objectionable under either the Midland or Van Dorn standards in finding that the Employer's objections regarding the "Vote Yes" petition (Employer Exhibit 1) should be overruled in their entirety. The "Vote Yes" petition, explicitly attributed to MNA, is readily recognizable as pro-union propaganda and contains no kind of pervasive misrepresentation.

A. *The Regional Director Appropriately Concluded That The "Vote Yes" Petition Was Not Objectionable Under Midland.*

The standard by which the Board assesses allegedly misleading campaign literature is well established. Generally, the Board does not "probe into the truth or falsity of the parties' campaign statements" and will not set aside an election on the basis of misleading campaign statements. Midland National Life Insurance Co., 263 N.L.R.B. 127 (1982) (declining to set aside election where employer attached newsletter to employees' paychecks misrepresenting that employees at another facility were terminated as a result of a strike and overstating amount union staff were paid); Virginia Concrete Corp., 338 N.L.R.B. 1182 (2003) ("[T]he Board does not set aside elections on the basis of false or misleading campaign statements."); Galbreath & Company, 288 N.L.R.B. 876 (1988) ("[T]he mere fact that a party makes an untrue statement, whether of law or fact, is not grounds for setting aside an election."). Instead, the Board intervenes only "in cases where a party has used forged

documents which render the voters unable to recognize propaganda for what it is.” Midland National Life Insurance Co., 263 N.L.R.B. at 133. The Board has not adopted a per se rule that the use of forged documents warrants setting aside an election; rather, the existence of a forgery triggers a “case by case examination to determine whether a voter can ‘recognize propaganda for what it is.’” Albertson’s, Inc., 344 N.L.R.B. 1357, 1359 (2005).

Finding that MNA did nothing more than copy signatures from authorization cards, the Hearing Officer and Regional Director correctly concluded that the “Vote Yes” petition did not constitute a forgery. In reaching her conclusion, affirmed by the Regional Director, the Hearing Officer cited to Champaign Residential Services, 325 N.L.R.B. 687 (1998), in which the Board explicitly addressed an objection related to a flyer with photocopied signatures finding that the conduct at issue was insufficient to set aside an election even under the Van Dorn standard. In that case, the Board concluded that a flyer with 68 photocopied signatures of unit members under a heading stating “We are winning! Join Us!” was not a forgery, commenting,

[T]he document here does not constitute a forgery, as it was clear from the face of the flyer that it emanated from the Petitioner and, with one exception, the signatures on the flyer matched those submitted by employees on the Petitioner’s “Vote Yes!” petitions. Further, we find no evidence that the flyer involved misrepresentations “so pervasive and [] deception so artful that employees will be unable to separate truth from untruth ... [so that] their right to a free and fair election would be affected.” In this regard, the record shows that misrepresentations in the gathering and compilation of the signatures were minimal. As the hearing officer found, all employees who signed the petition knew or should have known that their signatures indicated their support for the Union and all but two knew or should

have known that their signatures would be shared with other voters. We conclude that such minor deviation from a perfect recording of employee sentiment does not constitute the type of deception which concerned the court in Van Dorn.

Thus, Champaign Residential Services, 325 N.L.R.B. 687 (1998), clearly supports the Region's finding that the "Vote Yes" petition is not a forgery that would even rise to the level of triggering the Midland analysis.

Nonetheless, the Employer contends the Region should have relied on Albertson's, Inc., 344 N.L.R.B. 1357 (2005) and Mt. Carmel Medical Center, 306 N.L.R.B. 1060, n.2 (1992) to conclude that the "Vote Yes" petition constituted a forgery. Both cases, however, are readily distinguishable. In Albertson's, Inc., 344 N.L.R.B. 1357 (2005), the Board set aside an election based upon the union's circulation of a fake letter, forged on the employer's letterhead, claiming the existence of a company plan to convert nonunion stores at various locations potentially resulting in job loss and reduction in wages and benefits for current employees. The Board concluded that, although the Employer attempted to respond to the forged document, the evidence did not show that employees were able to recognize that the forged letter was campaign propaganda favoring the union. In Mt. Carmel Medical Center, 306 N.L.R.B. 1060, n.2 (1992), the Board adopted a Hearing Officer's recommendation to set aside an election where an employer distributed a forged union LM-2 form to employees prior to the election and employees would not have been able to identify the correct LM-2 form. Thus, both Albertson and

Mt. Carmel involved the creation of fake versions of documents entirely unlike the obvious piece of propaganda at issue in this case.

In challenging the Regional Director's finding that the circulation of the "Vote Yes" petition was insufficient to set aside the election under Midland, although stated convolutedly, the Employer further appears to request review of the Regional Director and Hearing Officer's factual finding that MNA produced the "Vote Yes" petition by digitally transferring signatures from the authorization cards. The Employer contends that the Regional Director's finding was erroneous because of Hermanson's testimony related to the production of the "Vote Yes" petition which was completed after MNA submitted its showing of interest to the Region. At hearing, Hermanson testified regarding the production of the "Vote Yes" petition as follows:

HEARING OFFICER FLEMING: Okay. So, had someone already – you don't have to get into complete details – but had someone already pulled all the signatures, done the work of pulling the signatures? Is that why you removed them?

HERMANSON: Yes. Yeah. So, some of the scans had been done previously. Most of them were done the – that week right before, so the Monday through the Friday before the 19th, which would be the – the 16th is the Friday. And then some were done on Monday, and then on Tuesday the 20th we really created the document.

(Hermanson, 110: 8-17).²⁰ Hermanson, thus, did not fully explain how the "Vote Yes" petition was created as a part of his testimony. However, contrary to the Employer's claims, Hermanson did not testify that MNA waited to scan the

²⁰ For the sake of clarity, questions and answers have been replaced herein with the names of the individuals who were speaking at hearing.

authorization cards until the week of November 16. Rather, Hermanson was asked about the process of digitally isolating the signatures on the authorization cards and described when that had occurred.

The Employer apparently also challenges the Hearing Officer and Regional Director's factual finding that the signatures on the "Vote Yes" petition came from the authorization cards because some of the signatures appear in color on the "Vote Yes" petition and because MNA did not copy the blue signature boxes from the authorization cards onto the "Vote Yes" petition based, largely, on MNA's use of a black and white photocopy of Perry's authorization card as an exhibit at hearing. Such a claim is nonsensical. MNA very clearly introduced a black and white photocopy of a signed authorization card at hearing. (Compare Petitioner Exhibit 1 with Petitioner Exhibit 2). That MNA used a black and white photocopy, rather than a color copy, at hearing or that it isolated the signatures from the signature box does not show that it manipulated or created the signatures.²¹ The Employer has offered no rational grounds to overturn the Hearing Officer's sound conclusion that MNA created the "Vote Yes" petition by digitally transferring RNs' signatures from the authorization cards.

Even if the Regional Director, *arguendo*, could have found the signatures to somehow constitute forgeries, whether or not a voter could have recognized the signatures themselves as forgeries is not the question at issue in Midland.

²¹ Should any doubt remain as to whether MNA altered signatures, the authorization cards are on file with the Region and the Board can compare the signatures.

Rather, the Board assesses whether the use of a forgery renders a voter unable to recognize a particular document as propaganda. The Hearing Officer and Regional Director correctly concluded that the “Vote Yes” petition was readily recognizable as campaign propaganda and, thus, unobjectionable under Midland. In both Albertson’s, Inc. and Mt. Carmel Medical Center, the Board found that the use of forgery prevented employees from recognizing the document as campaign propaganda. Here, the petition was distributed by MNA, included the MNA logo in multiple locations, and even included MNA’s address, which unmistakably identified MNA as the source of the document. The Hearing Officer and Regional Director, thus, correctly concluded that the “Vote Yes” petition, a readily recognizable piece of propaganda, did not constitute a forgery and, thus, was not objectionable under the Midland standard.

In its request for review, the Employer seemingly suggests that the Board’s analysis under Midland includes an assessment of coerciveness pursuant to an objective standard citing Picoma Industries, 296 N.L.R.B. 498 (1989). In its request for review (at pages 23-24), the Employer states,

The Board evaluates the coerciveness of objectionable conduct under an objective standard. Contrary to the Hearing Officer’s apparent conclusion, an objecting party need not adduce evidence that the conduct at issue actually coerced specific employees. Picoma Industries, 296 NLRB 498 (1989). The standard is “whether the misconduct, taken as a whole, warrants a new election because it has ‘the tendency to interfere with employees’ freedom of choice’ and ‘could well have affected the outcome of the election.’”

In Picoma Industries, 296 N.L.R.B. 498 (1989), the Board found that a third party's threats to blow up the company and physically injure employees who did not support the union and to damage their property would reasonably tend to create a general atmosphere of fear and reprisal rendering a free election impossible. In doing so, the Employer applied its standard applicable to assessing alleged objectionable conduct attributable to third parties not its standards applicable to allegedly misleading campaign propaganda. The Employer has articulated no explanation as to why Picoma should apply under these circumstances which involved campaign propaganda not conduct or threats. The Regional Director and Hearing Officer correctly applied Midland in assessing the "Vote Yes" petition, an obvious piece of campaign propaganda.

B. The Regional Director Appropriately Concluded That The "Vote Yes" Petition Was Not Objectionable Under Van Dorn.

While the Board adheres to the Midland approach set out above, the Sixth Circuit, in Van Dorn, adopted its own modified standard to assess pre-election misrepresentations finding that where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected, a new election is warranted. N.L.R.B. v. Gormac Custom Mfg., Inc., 190 F.3d 742, 746 (6th Cir. 1999). In assessing an alleged misrepresentation under Van Dorn, the Sixth Circuit considers several factors including (1) the timing of the misrepresentation; (2) whether the other party had an opportunity to respond; (3) the nature and extent of the

misrepresentation; (4) whether the source of the misrepresentation was identified; and (5) whether there is evidence that employees were affected by the misrepresentation. N.L.R.B. v. Gormac Custom Mfg., Inc., 190 F.3d 742, 746 (6th Cir. 1999). The Board has not accepted the Van Dorn approach and continues to adhere to the Midland standard. UNISERV, 340 N.L.R.B. 199 (2003).

Although contending that the “Vote Yes” petition was objectionable under Van Dorn in its request for review, the Employer has repeatedly failed to describe how the Van Dorn factors should be applied under these circumstances and does not cite even a single comparable case supporting its position. Contrary to the Employers’ claims, the Region correctly concluded that any alleged misrepresentation in the “Vote Yes” Petition was not so pervasive as to require that the election be set aside where the evidence showed, at most, that a single employee out of the 400 employees included on the “Vote Yes” petition purportedly changed her mind about supporting the Union prior to its circulation.

In its request for review, the Employer appears to challenge the Regional Director’s factual finding that the flyer, at most, misrepresented the union sentiments of one employee.²² The Regional Director’s finding on that point, however, was accurate and fully supported by the record. The Employer

²² The Employer included this argument in the section of its request for review apparently addressing the Region’s application of the Midland standard. Although contending that the Region failed to appropriately apply Board precedent, the Employer’s poorly organized request for review demonstrates that the Employer does not comprehend the interplay of the Board’s rulings related to campaign propaganda or alleged voter fraud.

offered evidence showing that Perry had privately changed her mind about supporting MNA after she executed an authorization card and twice indicated that she intended to vote for MNA. The Employer did not offer any competent evidence related to the union sentiments of any of the other approximately 400 RNs included on the “Vote Yes” petition.²³

The Employer attempts to overcome the utter lack of evidence showing that any of the other approximately 400 RNs included on the “Vote Yes” petition did not support MNA or intend to vote for MNA by relying on mere supposition. The Employer argues that the Board should infer that MNA misrepresented at least 50 RNs’ support for unionization because the “Vote Yes” petition contained approximately 400 signatures but only 350 votes were cast for MNA in the election. Some 65 eligible voters did not participate in the election and another 26 voted subject to challenge. No evidence exists to show that any of the 65 eligible voters and the 26 RNs who voted subject to challenge did not support MNA or showing why the 65 RNs who did not participate in the election did not vote.

Indeed, the evidence does not show that MNA even misrepresented Perry’s position let alone the support of other RNs. MNA had a reasonable,

²³ The Employer presented hearsay evidence through Sweet that ICU RNs Alysa Lopes, Heather Ferreira, Hailey Arruda, and Deborah Tarr-Johnson told her that they thought signing cards was for the purpose of obtaining more information about MNA. That testimony should not be considered with regard to whether the use of those RNs’ signatures on the “Vote Yes” petition was objectionable. The Employer failed to call those RNs, who are employed at the Hospital, as witnesses at hearing and there was absolutely no suggestion that they were somehow unavailable. Presumably, the Employer would have called them as witnesses if their testimony supported Sweet’s hearsay statements.

objective basis to believe Perry supported unionization and while Perry privately changed her mind, she never told MNA. Perry testified that she signed an authorization card because she intended to vote yes for MNA during an election. Perry told MNA that she intended to vote yes on two occasions and never told MNA that she had changed her mind. (Perry, 18, 27, 32, 34). Had Perry notified MNA that she no longer supported unionization, MNA would have likely removed her name from the “Vote Yes” petition as it did with other, similarly situated, RNs. At hearing, Hermanson credibly testified that MNA removed the names of approximately 10 to 12 RNs who indicated to its representatives that they no longer supported MNA or intended to vote for the union prior to its publication. (Hermanson, 89-102). Less than 2 months elapsed prior to MNA creating the “Vote Yes” petition and the evidence shows that MNA representatives remained in contact with RNs to gauge their support throughout that timeframe.²⁴

As described above, MNA created the “Vote Yes” petition by digitally transferring signatures from signed authorization cards. The authorization cards included an explicit authorization permitting MNA to add²⁵ RN signatures to a public petition. See Petitioner Exhibit 1 (*“I understand my*

²⁴ MNA did not ignore shifting employee sentiment. MNA was clearly in contact with RNs as it continued its organizing efforts and removed the names RNs who no longer supported MNA from its “Vote Yes” petition.

²⁵ “Add” means “join (something) to something else so as to increase the size, number, or amount.” New Oxford American Dictionary. As such, the term “add,” by definition, clearly denoted that the signatures will be included on a petition apart from the authorization cards. To do so, the signature would necessarily have to be moved from the card.

signature will be added to a public petition once a majority of nurses have signed.”). Moreover, the authorization cards signed by the RNs contained text virtually identical to that included on the back of the “Vote Yes” petition surrounded by the RNs’ signatures. Perry acknowledged that she signed an authorization card and that she read the text authorizing the addition of her signature to a public petition prior to signing the card. (Perry, 31; see Petitioner Exhibit 2).

The authorization cards utilized by MNA contained very explicit and clearly defined statements in support of unionization and forming a union in the MNA. Each authorization card contained a statement that the RN was choosing, not to simply request an election or to obtain more information, but to join his or her coworkers in forming a union as a part of MNA. (See Petitioner Exhibit 1 (“I choose to join with my co-workers in forming a union within the Massachusetts Nurses Association for the purpose of negotiating improvements in staffing, wages, benefits, and working conditions.”). Given the strength of the pro-MNA language included on the authorization cards, the signing of an authorization card could not reasonably be comprehended as anything other than signifying an intent to vote yes for and support the union in a subsequent election given that an election is the mechanism by which employees would form a union.

Assuming, *arguendo*, that the “Vote Yes” petition contained some sort of misrepresentation, the Regional Director appropriately concluded that misrepresentation was not the sort of artful deception rendering employees

unable to separate the truth from untruth at issue in Van Dorn. The petition was circulated by MNA on the Saturday prior to the election appearing in the Hospital on November 26, three days before November 29. Although MNA released the petition during the week of the election, it was not unduly close to the election date.²⁶ The Employer had ample opportunity – multiple days – to respond to the petition and release any materials it deemed necessary to counteract its content.

Moreover, any alleged misrepresentation was extremely limited in nature. At most, the Employer presented evidence of 1 RN who arguably felt that the “Vote Yes” petition was misleading because she, without notifying MNA, had personally decided to no longer support its unionization effort. The impact of any alleged misrepresentation, which was an extremely limited nature, was further diminished in that the “Vote Yes” petition was readily recognizable as MNA campaign propaganda. The petition included the MNA logo in multiple locations and even included MNA’s address, which unmistakably identified MNA as the source of the document.

While the Employer offered some very limited evidence that the “Vote Yes” petition “upset” a very limited number of RNs in some unidentified way, it has not shown that the petition in any way impacted the results of the election or even voters’ participation in the election. Of the over 700 voters, the Employer did not call a single witness to indicate that the petition altered his or her vote or that he or she chose to vote or not to vote after seeing the petition

²⁶ The circulation of the petition does not even come close to infringing on the 24-hour window prior of the election.

because he or she was intimidated by the showing of support for MNA. Even if the “Vote Yes” petition could somehow be construed as misleading, there is no basis to conclude that it was some sort of “deception” rendering voters unable to recognize it as campaign propaganda.

Contrary to the Employer’s claims, in a multitude of cases, the Board has found that allegations comparable to those asserted by the Employer in this case fail to demonstrate objectionable conduct. In Gormac Custom Manufacturing, 335 N.L.R.B. 1192 (2001), following remand from the 6th Circuit, the Board adopted the findings of an ALJ that certain alleged conduct did not interfere with employees’ exercise of free choice during an election and holding that the employer violated Section 8(a)(5), and derivatively Section 8(a)(1), by refusing to bargain with the union. In that case, the employer alleged that the union had distributed a leaflet to voters on the day of the election listing the names and signatures of employees who purportedly intended to vote in favor of the union. Several employees indicated that the union had not been authorized to use their names on pro-union leaflets, that they had been told that their signatures would remain confidential, and that they were told that their signatures would only be used in the organizing campaign. The employees had signed authorization cards stating, “I hereby authorize the United Steelworkers of America to represent me for the purpose of collective bargaining with my employer. This further authorizes the Union to send my name to the National Labor Relations Board and sign my name to union leaflets.” It was found that by signing the cards, the employees were

implicitly agreeing that, at that point in time, they intended to vote for the union.

In Somerset Valley Rehabilitation & Nursing Center, 357 N.L.R.B. 736 (2011), the Board rejected an employer's objection to an election where it alleged that, during the critical period, the union distributed a flyer containing statements made by employees that they did not make or authorize. The union collected signed releases from employees indicating that the employees were permitting the union "to use pictures made of me and comments made by me on this date." After collecting the releases, the union made a flyer that included the words "We're Voting Yes for 1199SEIU!" as well as statements from 25 employees including the words, "I'm voting yes," although none of the employees expressly authorized the union to use those words. The employer objected to the use of the words "I'm/We're voting yes" claiming that those words constituted an unauthorized misrepresentation.

The Board found the flyer unobjectionable under either the Midland or Van Dorn approach. Observing that an election could be set aside under Midland only on the basis of a forged document, the Board held that the flyer contained no forgery and voters could easily identify the flyer at issue as campaign propaganda. Further, in evaluating the flyer under Van Dorn, the Board observed that there was no pervasive misrepresentation or deception so artful that employees were unable to separate the truth from untruth. The union made efforts to verify the support of employees prior to publication and a reasonable reader would understand the words "I'm voting yes" as a

characterization of pro-union support. With respect to the “I’m voting yes” language, the Board further commented,

[N]o reasonable employee reading the Union’s flyer would think that all the listed employees actually got together and literally said, ‘We’re voting yes.’ That language appears on the cover and back of the flyer and is not attributed to any specific employee. A reasonable reader would have understood those words, as well as the repeated phrase, “I’m voting yes,” as characterizing the pro-union sentiments of the named employees as a whole.

As in Somerset, a reasonable reader would not construe the statements included on the “Vote Yes” petition as direct quotes attributed to the 400 RNs whose signatures appear on the document. Instead, a reasonable reader would understand those statements to constitute only a characterization of pro-union sentiment.

In Durham School Servs., LP, 360 N.L.R.B. 851, 851-852 (2014) an employer alleged that a union deceived voters by distributing a campaign flyer containing pictures of eligible voters and statements misrepresenting their intent to vote for the union. The day before an election, the union circulated a flyer, clearly identified as a union document, that included names and pictures of eligible voters captioned by the statements, “On February 22, 2013 WE’RE VOTING YES For Teamsters Local Union 991! We are voting ‘Teamsters YES!’ for a better future at Durham!”

In response, an employee contended that she did not intend to vote for the union and she did not authorize the union to attribute any quotation to her. That employee had signed a document that had a preprinted statement: “I hereby give permission to the International Brotherhood of Teamsters to use

my likeness and name in Teamster publications.” That document contained a statement, “I support forming a union with the Teamsters because,” with “I want fairness” handwritten in. That employee also signed another petition that stated, “I’m voting to have a voice in our working standards at Durham by voting for Teamster representation on February 22.”

First, the Board found that the evidence failed to establish that the union misrepresented the sentiments of the employee. Thus, there was no basis to conclude that the union engaged in any misrepresentation. Durham School Servs., LP, 360 N.L.R.B. 851, 852 (2014). Even assuming that the employee did not support the union, under the Midland standard, there was no claim of forgery and there was no dispute that the flyer was easily recognizable as campaign propaganda. In its decision, the Board further commented,

It is well established that the Midland standard applies where unions circulate campaign literature that identifies individual employees as union supporters, as well as attributing pro-union statements to them or representing that they intend to vote for the union. As the Board has explained when uniformly rejecting election objections based on such literature, employees can easily identify [it] as campaign propaganda.

Durham School Servs., LP, 360 N.L.R.B. at 851 (2014) (internal quotations omitted). The Board reached the same result in applying Van Dorn, finding that the union engaged in no pervasive misrepresentation or artful deception. Durham School Servs., LP, 360 N.L.R.B. at 852 (2014) Similarly, in enforcing the Board’s decision in Durham, the D.C. Circuit observed,

“[T]he Board has routinely applied Midland in situations similar to the present case: that is, in situations in which unions allegedly have engaged in misrepresentation by

distributing campaign flyers designed to suggest that specified employees supported the union. In each case, the Board found that, under Midland, the contested election propaganda was not of the type sufficient to set aside the election.”

Durham School Services, LP v. N.L.R.B., 821 F.3d 52, 59 (D.C. Cir. 2016)

(internal citations omitted). See, e.g., Enterprise Leasing Company, 357

N.L.R.B. 1799 (2011) (rejecting employer’s objection to election on basis that union circulated a flyer containing the statements, “Yes, Everybody can make the right choice!! To end Unfair treatment & Unfair play!!” as well as a longer “Dear Colleagues” note encouraging employees to allow the union to be their voice for better pay, benefits, and treatment, using an unauthorized image of an employee where parties stipulated that the use of the photograph was unauthorized but where no forgery was involved and employees could easily identify the flyer as campaign propaganda);²⁷ Parkview Community Hospital

²⁷ In its request for review, the Employer contends that the Hearing Officer concluded that Enterprise and Durham irreconcilably conflicted. In her decision, the Hearing Officer commented:

It should be noted that the Board in Enterprise Leasing observed that there was no evidence in the record to show that the employee whose photograph was used on a flyer did not support the union. Such a discussion indicates that the Board found the question of whether the union misrepresented the employee’s union support was a material question. That indication cannot be reconciled with the clear statement in the more recent Durham School decision that a misrepresentation of an employee’s support is not grounds for setting aside an election.

(Hearing Officer’s Decision, at 15). Contrary to the Hearing Officer’s assessment, in both Enterprise and Durham School, the Board evaluated whether the document in question was even allegedly misleading. In each case, the Board considered evidence of the employees’ support to assess the

Medical Center v. N.L.R.B., 664 Fed. Appx. 1 (D.C. Cir. 2016) (unpublished) (finding substantial evidence supported board’s finding that flyer, which contained images of two employees who did not give their authorization to use their names or likenesses, was not sufficient to set aside election); BFI Waste Services, 343 N.L.R.B. 254, n.2 (2004) (adopting a hearing officer’s finding that a union did not engage in any objectionable misrepresentation under either the Midland or Van Dorn standards where union created and attributed quotes to two employees where union told employees that it would prepare a quote for them).

In reaching his correct conclusion that the “Vote Yes” petition was not a pervasive or artful misrepresentation under Van Dorn, the Regional Director does not appear to have based his finding on the authorization printed on the face of the authorization cards in creating the “Vote Yes” petition. Nonetheless, in its request for review, the Employer apparently still continues to seek a finding that MNA did not rely on the authorization cards as authorization for placing RNs’ signatures on the “Vote Yes” petition.

existence of an alleged misrepresentation. In Enterprise, where there was no evidence that the employee did not support the union, the Board found that any alleged misrepresentation extended only to the union’s alleged misrepresentation that the employee had authorized use of his image on the flyer. In Durham, the Board found no misrepresentation whatsoever and concluded that the flyer was unobjectionable although proceeding with an analysis under both Van Dorn and Midland for the sake of argument. See Durham School Servs., LP, 360 N.L.R.B. at 852 (“[W]e agree with the Regional Director that the evidence fails to establish that the Union misrepresented the sentiments of Perez. The initial document bearing Perez’ signature . . . gave the Union sufficient reason to believe it had Perez’ support. There is no basis to conclude. . . that the Union engaged in any misrepresentation.”).

Such a claim is entirely baseless and explicitly contradicted by the record evidence. At hearing, Hermanson very clearly indicated that MNA relied on the explicit authorization printed on the authorization cards (See Petitioner Exhibit 1) (*“I understand my signature will be added to a public petition once a majority of nurses have signed.”*) when including RNs’ signatures on the “Vote Yes” petition. Moreover, Hermanson’s testimony demonstrates that the Employer was explicitly aware of MNA’s position regarding the authorization cards:

ATTORNEY RIZZOTTI: When you were producing Employer Exhibit 1, did you seek permission from each one of these nurses to use their name on Employer Exhibit 1?

HERMANSON: That permission is sought on the card, itself.

ATTORNEY RIZZOTTI: I understand the position – your position with respect to the card. My question is more specifically did you directly either call, email, communication with any of these nurses to ask “Can we use your signature on Employer Exhibit 1?”

(Hermanson, 72:19-22; 73: 1-2). A similar exchanged occurred before the conclusion of Hermanson’s testimony:

ATTORNEY RIZZOTTI: okay. So, to put it another way, you can’t testify that every single person on this list was specifically told we can use your signature on Employer Exhibit Number 1?

HERMANSON: I could only tell you that it stated that clearly on the card that they signed.

ATTORNEY RIZZOTTI: I know your view on the card[.]

(Hermanson, 72:19-22; 73: 1-2). Thus, the record conclusively establishes that MNA relied upon the written authorization on the authorization cards in

creating the “Vote Yes” petition and that the Employer was aware of that position.

C. *The “Vote Yes” Petition Did Not Improperly Publicize RNS’ Intended Votes.*

In the absence of any legal support, the Employer continues to contend that the election should be set aside because MNA allegedly publicized the intended votes of RNs which somehow interfered with the secrecy of the election under existing Board precedent. (See Employer’s Request for Review, at 35 (“Beyond the issues created by the forgeries and misrepresentations, the MNA’s flyer further flaunted (sic) the law by divulging both the support and votes of some nurses, without their permission, undermining the Board’s secret ballot procedures.”)). The Employer further erroneously contends that the Regional Director and MNA have identified no precedent addressing a Union publicizing employees’ union sympathies.

As correctly noted by the Regional Director, in Durham School Services, LP, 360 N.L.R.B. 851, 852 (2014), the Board majority explicitly rejected the creation of a rule requiring a union to obtain consent from specific employees to disclose how they intended to vote. The Midland standard, as extensively described above, has routinely been applied to evaluate campaign literature identifying particular employees as union supporters. Durham School Services, LP, 360 N.L.R.B. 851, 851 (2014) (“It is well established that the *Midland* standard applies where unions circulate campaign literature that identifies individual employees as union supporters, as well as attributing pro-

union statements to them or representing that they intend to vote for the union.”); see Champaign Residential Services, 325 N.L.R.B. 687 (1998); BFI Waste Services, 343 N.L.R.B. 254, n.2 (2004); Somerset Valley Rehabilitation & Nursing Center, 357 N.L.R.B. 736 (2011); Enterprise Leasing Company, 357 N.L.R.B. 1799 (2011). The Regional Director correctly concluded that the “Vote Yes” petition was unobjectionable under either the Midland or Van Dorn standards.

The Employer has not requested that the Board adopt a new standard and, thus, it should not engage in further evaluation in assessing the request for review. Even if such a consideration were relevant, the facts at issue in this case are simply not of a sort implicating employees’ rights to either participate or refrain from engaging in union activities. No evidence exists to suggest that the secrecy of RNs’ votes during the election was not maintained or that RNs could not freely cast their ballots for or against unionization.²⁸ When RNs voted during the election they were free to cast their ballots however they chose. MNA, through Hermanson, explained that it created the “Vote Yes” petition to show RNs that they were supported by one another prior to the election not to publicize their intended votes. A reasonable voter would construe the “We are Voting Union Yes!” and “We’re Voting Yes” text on the

²⁸ At page 35 of its request for review, the Employer incoherently writes, “Moreover, neither *Durham School Services* nor the Regional Director’s Decision reflect that not only did the MNA’s flyer misrepresent some employees’ intended votes and reveal other’s intended votes but it also necessarily revealed employees’ *actual* votes.” The “Vote Yes” petition, released days before the election was held, obviously did not disclose any RNs’ actual votes.

petition not as quotations from the RNs whose signatures were included on the petition but as a characterization of union support.²⁹

Further, MNA transferred the signatures from signed authorization cards that contained an explicit authorization to release them on a public petition. Perry acknowledged that she read the statement “I understand my signature will be added to a public petition once a majority of nurses have signed” on the authorization card prior to signing the card and knew that her name could be added to a public petition. (Perry, 31; see Petitioner Exhibit 2). At hearing, Perry further admitted that she believed that she signed the authorization card because she was going to vote yes for the union. (Perry, 34). RNs clearly could choose whether or not to sign authorization cards and, thus, determine whether they wished to either participate or refrain from engaging in public support of the unionization. Indeed, the evidence adduced at hearing shows that RNs did not feel obligated to vote for MNA merely because they were included on the petition or had signed an authorization card. Perry, who voted in the election, testified at hearing that she changed her mind about voting for MNA despite signing an authorization card and being included on the “Vote Yes” petition.

The Regional Director appropriately applied existing Board precedent in finding the “Vote Yes” petition unobjectionable. The evidence adduced in this case further demonstrates that no evidence exists to show that any RN was

²⁹ If any new standard were to be devised, its application should be entirely retroactive. Here, RNs continued to show their ample support for MNA during the election by selecting MNA as their bargaining representative by a significant margin.

coerced in his or her participation in or desire to refrain from union activities.
The Employer's request for review should be rejected in its entirety.

IV. CONCLUSION

The Regional Director correctly found, based on the record evidence and the applicable legal precedent, that the Employer failed to allege objectionable conduct sufficient to set aside the election in this matter. In its request for review, the Employer has failed to identify any persuasive reason that the Board should overturn the Regional Director's findings and it should, thus, be denied in its entirety.

Respectfully submitted,

Massachusetts Nurses Association,

By its attorneys,

/s/ Kristen A. Barnes

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Dated: March 20, 2019

CERTIFICATE OF SERVICE

I, Kristen A. Barnes, hereby certify that I have this day by PDF e-mail served a copy of the foregoing Massachusetts Nurses Association's "Amended" Opposition To Employer's Request for Review of Hearing Officer's Decision upon Anthony D. Rizzotti, Esq. (ARizzotti@littler.com) and Gregory A. Brown, Esq. (GBrown@littler.com) Littler Mendelson, P.C., One International Place, Suite 2700, Boston, Massachusetts, 02110 and Paul J. Murphy (Paul.Murphy@nlrb.gov), Acting Regional Director, National Labor Relations Board, Region 1, 10 Causeway Street, Room 601, Boston, Massachusetts, 02222.

Dated: March 20, 2019

/s/ Kristen A. Barnes
Kristen A. Barnes